THE FEDERAL EMPLOYERS' LIABILITY ACT.*

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3. Jurisdiction—a. Of the Federal Courts.—Previous to any provision in the act to that effect, any cause of action

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within its terms was within the jurisdiction of a federal circuit court, without reference to the citizenship of the parties, where the requisite amount was involved, as a suit of a civil nature arising under the laws of the United States.[1] By § 6 of the act, as amended April 5, 1910, it was expressly provided that actions under the act might be brought in the circuit courts of the United States; and now, of course, since the abolition of those courts, under the Judicial Code, in the federal district courts.[2] And where a suit brought under the act involves a determination of the meaning of the phrase "person employed by such carrier in interstate commerce" federal jurisdiction exists, even though the complaint should be dismissed because the plaintiff was not a person so employed.[3]

Admiralty Jurisdiction of Federal Courts.—Whether or not the Act of April 22, 1908, has, by implication, repealed the federal statutory provision permitting shipowners to limit their liability, in so far as such latter provision might be invoked by a railway company to limit its liability for injuries to employees upon vessels used by it in interstate commerce, it does not deprive a court of admiralty of its general jurisdiction over limitation of liability because such a claim is involved, nor of jurisdiction to hear and determine a claim on its merits therein, with the consent of the claimant, or where the proceeding was begun before the passage of the statute and where any objection to jurisdiction on such ground has been waived.[4]

1. **Jurisdiction of the federal courts.**—Cound *v.* Atchison, etc., R. Co. (C. Ct. W. D. Texas, El Paso Div., Nov. 6, 1909), 173 Fed. 527; Zikos *v.* Oregon, R. Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893, 904; Hoxie *v.* New York, etc., R. Co. (S. Ct of Errors of Conn., July 20, 1909), 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co. (82 Conn.), 73 Atl. 762; Clark *v.* Southern Pac. (C. Ct. W. D. Tex. El Paso Div. Dec. 20, 1909), 175 Fed. 122.

2. **Action now brought in federal district courts.**—Act of March 3, 1911, ch. 13, §§ 289-296, 36 Stat. L. 1167.

3. **Suit involving construction of act—Effect of dismissal.**—Colasurdo *v.* Central R. R. of New Jersey (C. Ct. S. D. N. Y., July 1, 1910), 180 Fed. 832, affirmed (C. C. A.), 192 Fed. 901, 113 C. C. A. 379.

4. **Admiralty jurisdiction.**—The Passaic (Dist. Ct. E. D. N. Y., Aug. 3, 1911), 190 Fed. 644.

b. Concurrent Jurisdiction of State Courts.—It is a general principle that a right given by a federal statute may be enforced in the state courts, unless jurisdiction has been expressly, or by necessary implication, reserved to the federal courts.[5] And previous to the existence of any express provision to that effect in the Employers' Liability Act itself, it was well settled that actions arising thereunder might be maintained in the state as well as the federal courts where their jurisdiction, as prescribed by local laws, was adequate to the occasion.[6] But the existence of such concurrent jurisdiction in the state courts, as well as the power of congress to confer it, having been denied by the Supreme Court of Errors of Connecticut in the case of Hoxie *v.* New York, etc., R. Company,[7] Congress enacted the amendment of April 5, 1910, in which § 6 is amended so as to provide, inter alia, that: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states;" the object of such express provision being, as stated in the report of the Senate Judiciary Committee, to leave no excuse for the courts of other states to follow in the error of the Supreme Court of Errors of Connecticut.[8] This particular provision added nothing to the act, of course, since, as stated, the existence of concurrent jurisdiction in the state courts was already

5. **Concurrent jurisdiction of state courts—General rule.**—Bradbury *v.* Chicago R. I. & P. R. Co. (Iowa), 128 N. W. 1; Owens *v.* Chicago, etc., R. Co. (Minn.), 128 N. W. 1011; St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark., Fed. 27, 1911), 135 S. W. 874.

6. **Same—Under the Act of April 22, 1908.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; St. Louis, etc., R. Co. *v.* Conley (Cir. Ct. of App. 8th Cir. April 11, 1911), 187 Fed. 949; Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893; Owens *v.* Chicago, etc., R. Co. (Minn.), 128 N. W. 1011, 1013; Bradbury *v.* Chicago, etc., R. Co. (Iowa), 128 N. W. 1; St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, 1180.

7. Hoxie *v.* New York, etc., R. Co. (S. Ct. of Errors of Conn. July 20, 1909), 73 Atl. 754, followed in Mondou *v.* New York, etc., Co. (82 Conn.), 73 Atl. 762, and reversed in Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169.

8. **Same—Express provision of act.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D., June 4, 1910), 179 Fed. 893, 902.

well established; hence there is no merit in the contention made in cases brought since this amendment, upon causes of action arising before, that the jurisdiction of the federal courts is, as to those actions, exclusive.[9]

Constitutionality.—There is no doubt as to the constitutionality of this provision of the act.[10]

Duty of State Courts to Take Jurisdiction.—Nor may jurisdiction of an action to enforce rights arising under the Act of April 22, 1908, be declined by the courts of a state whose ordinary jurisdiction, as prescribed by local laws, is adequate to the occasion, on the theory that such statute is not in harmony with the policy of the state, or that the exercise of such jurisdiction will be attended by inconvenience and confusion because of the different standards of right established by the congressional act and those recognized by the laws of the state.[11] The constitution of the United States being the supreme law of the land, state and federal courts are alike subject to its provisions, and the refusal of the former to enforce rights conferred by congress would put them in the same category as would a refusal to entertain causes flowing from any other recognized source of authority. It would be an anomaly

9. **Effect of express provision as to cases previously arising.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App. June 29, 1912), 149 S. W. 841, 843; St. Louis, etc., R. Co. *v.* Geer (Civ. App. Dallas, June 22, 1912, rehearing denied, Oct. 12, 1912), 149 S. W. 1178, 1180; Bradbury *v.* Chicago, etc., R. Co. (Iowa), 128 N. W. 1, 6; Owens *v.* Chicago, etc., R. Co. (Minn.), 128 N. W. 1011, 1013; Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D., June 4, 1910), 179 Fed. 893, 901.

10. **Constitutionality of provision as to concurrent jurisdiction.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing Hoxie *v.* New York, etc., R. Co. (S. Ct. of Errors of Conn. July 20, 1909), 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co. (82 Conn.), 73 Atl. 762.

11. **Duty of state courts to take jurisdiction.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 reversing Hoxie *v.* New York, etc., R. Co. (S. Ct. of Errors of Conn. July 20, 1909), 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co. (82 Conn.), 73 Atl. 762. See, also, Midland Valley R. Co. *v.* Le Moyne (Sup. Ark. May 27, 1912. On rehearing, July 1, 192), 148 S. W. 654.

in our system if state tribunals, after having so long entertained the grievances of litigants, where rights are traceable to congressional legislation, should refuse to do so further because of the fact that there has been provided by a power clearly competent different rules of liability for those engaged in interstate commerce from those which may be fixed by statute or recognized by decisions in the several states.[12]

c. Removal of Cause—Prior to Express Prohibition Contained in Act.—Previous to the incorporation of the prohibition against removal into § 6 of the act by the Amendment of April 5, 1910, causes arising under the act and brought in the state courts might be removed to the federal courts subject to the rules applicable in other cases.[13] In accordance with those rules, it was held that an action brought in reliance upon the Act of April 22, 1908, was not removable as one involving a federal question where the declaration contained no statement or suggestion that the result of the suit would depend upon the construction of the act.[14] And where removal was had on the ground of diversity of citizenship, the case was not subject to remand on it appearing that the parties were of the same citizenship, if federal jurisdiction was further shown by the fact that the suit involved a construction of the act, it being a law of the United States.[15] Other cases, involving questions as to the joinder of resident and nonresident defendants in order to prevent removal,[16] the right to remove

12. **Same.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893, 901.

13. **Removal of cause—Prior to express prohibition against removal.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D., June 4, 1910), 179 Fed. 893, 900.

14. **Same—Where declaration failed to show case arising under the act.**—Nelson *v.* Southern R. Co. (C. Ct. N. D. Ga. June 21, 1909), 172 Fed. 478.

15. **Removal for diversity of citizenship failure of proof—Remand.**—Colasurdo *v.* Central R. R. of New Jersey (C. Ct. S. D. N. Y., July 1, 1910), 180 Fed. 832, affirmed (C. C. A.), 192 Fed. 901, 113 C. C. A. 379.

16. **Miscellaneous cares involving right to remove previous to express prohibition against removal.**—Taylor *v.* Southern R. Co. (C. Ct. N. D. Ga. April 23, 1910), 178 Fed. 380.

where neither party was a resident of the district,[17] and the waiver of objections in such case,[18] are cited below.

Removal Subsequent to Express Prohibition Embodied in Act.—The general purpose and effect of the Amendment of 1910 (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1325]) to the Act of April 22, 1908, providing that no case arising thereunder and brought in any State court of competent jurisdiction shall be removed to any court of the United States, is to withdraw the right of removal in cases arising under the act when the action has been instituted in the state court, and to require litigants desiring to have the results of the trial reviewed by reason of the presence of a federal question to proceed by writ of error to the state court making final disposition of the cause in its jurisdiction.[19]

Since the incorporation of this express prohibition against removal into § 6 of the act, however, the question has arisen whether removal may not be had where there is ground therefor under some other law, notably, for example, diversity of citizenship. In a case arising in the Federal Circuit Court for the Eastern District of Texas it was held that the prohibition contained in the act did not prevent a removal in case there was a diversity of citizenship, the court being of the opinion that congress, having created a liability by the Act of April 22, 1908, which did not exist before, and seeing that the volume of litigation growing out of that act which would reach the federal courts was destined to be very large, intended only to say that the act alone should not give a defendant the right to remove a cause of action brought originally in the state court; and that there was no intention on the part of congress to destroy the right of removal which

17. Ex parte Wisener, 203 U. S. 449, 51 L. Ed. 264, 27 S. Ct. 150; Bottoms *v.* St. Louis, etc., R. Co. (Cir. Ct. N. D. Ga., May 3, 1910), 179 Fed. 318, 319; Clark *v.* Southern Pac. Co. (C. Ct. W. D. Tex., El Paso Div., Dec. 20, 1909), 175 Fed. 122, 126.

18. In re Moore, 209 U. S. 496, 52 L. Ed. 904, 28 S. Ct. 587; Clark *v.* Southern Pac. Co. (C. Ct. W. D. Tex., El Paso Div., Dec. 20, 1909), 175 Fed. 122, 127.

19. **Removal subsequent to express prohibition—General effect of provision against removal.**—Lloyd *v.* North Carolina R. Co., 78 S. E. 489.

a defendant might have by virtue of some other provision of law.[20] Reason and the practically unanimous weight of authority, however, combine to support the opposite view, and there can be no doubt that the fact that the case is one arising under and controlled by the federal act is sufficient to prevent its being removed into a federal court upon any ground whatsoever.[21] Not only is this conclusion deducible from the perfectly plain language of the act itself, and the impropriety of the courts reading into it exceptions, the discussion of which congress evidently intended to foreclose,[22] but a reference to the debates in congress, upon the passage of the amended section, is sufficient, as pointed out in several cases, to dispel all doubt, and to show that it was the intention of congress to give the plaintiff his choice of a forum in actions arising under the act, and, such choice having been once made, to prevent a removal thereafter upon any ground. This is made perfectly plain by the following brief history of its enactment taken from a late case:

"The bill amending § 6 of the Employer's Liability Act, approved April 22, 1908, was considered in the Senate on March 30, 1910. As the bill left the House and reached the Senate, the clause in question read as follows:

> " 'The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states.' Congressional Rec., Second Sess. 61st Congress, vol. 45, part IV, p. 3994.

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20. Same—Right to remove on other grounds.—Van Brimmer *v.* Texas, etc., R. Co. (C. Ct. E. D. Tex. Jeff. Div., Oct. 2, 1911), 190 Fed. 394, 398, 399.

21. Same—Weight of authority against right to remove upon any ground.—Strauser *v.* Chicago, etc., R. Co. (Dist. Ct. D. Neb., Hastings Div.), 193 Fed. 293; Symonds *v.* St. Louis, etc., R. Co. (Cir. Ct. W. D. Ark. Tex. Div.), 192 Fed. 353; Ulrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y.), 193 Fed. 768; Kansas City So. R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579.

22. Same—Language of act conclusive.—Symonds *v.* St. Louis, etc., R. Co. (Cir. Ct. W. D. Ark.), 192 Fed. 353, 354; Ulrich *v.* New York, etc., R. Co. (Dist. S. D. N. Y.), 193 Fed. 768, 770; Kansas City So. R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579, 581; Strauser *v.* Chicago, etc., R. Co. (Dist. Ct. D. Neb. Hastings Div., Feb. 12, 1912), 193 Fed. 293.

"The question of removal was fully discussed. In the course of the discussion the following amendment was presented:

> " 'Provided, that every common carrier by railroad subject to the provisions of this act shall be deemed a citizen of every state into or through which its line of railroad shall be constructed or extend.' Id., p. 3995.

"This was criticised on the ground that it would not fully effect the purpose intended; that is, the denial of the right of removal. It was shown that this amendment would affect only the right of removal on the ground of diverse citizenship, and would not affect the right of removal on the ground that a federal question was involved. The discussion was resumed in the Senate the next day. Senator Paynter, of Kentucky, said:

> " 'I offer an amendment which will give to the plaintiff the right to select the forum in which his case shall be tried. He can select the federal or the state court, as he may prefer, to try his case arising under the act in question.'

"The amendment offered was as follows:

> " 'And no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'

"Upon the reading of the proposed amendment, Mr. Bailey, of Texas, said:

> " 'That, Mr. President, is entirely agreeable to me, because it takes these cases out of the operation of the removal act.' Id. 4051.

"This amendment was adopted and incorporated in the bill. The House concurred on April 2, 1910, on which date this amendment was discussed. It was stated by Mr. Mann, of Illinois, that the effect of the amendment was that suits brought under the act should not be subject to removal, 'no matter what the amount or citizenship.' Mr. Parker, who had charge of the bill, added:

> " 'No matter what the amount or citizenship. The idea was that a writ of error would issue only upon a federal question at the termination of the suit.' Id. 4158.

"These discussions disclose fully the intention of congress.

The language plainly expresses that intention, and excludes any other."[23]

If further authority in favor of this view were needed, it is found in the fact that the prohibition in question has been re-enacted by congress as a proviso to § 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087); for it is quite plain that the Judicial Code, in its general purpose, seeks further to restrict the jurisdiction of the federal courts, and that a special restriction of this kind, placed as it is at the close of the section granting the general right of removal, shows that congress intended that no case arising under the act referred to therein should be removed from the state court upon any ground. In other words, it is obvious that, in its re-enactment as a part of § 28 of the Judicial Code, congress had in mind all of the various grounds of removal, including diversity of citizenship and local influence and prejudice.[24]

Constitutionality of Prohibition against Removal.—The contention made in several cases that this prohibition against removal is unconstitutional has been held to be without merit. The right of removal to a federal court in any case being entirely statutory and non-existent in the absence of an act of congress conferring such right, it can hardly be said that an act prohibiting removal is unconstitutional; and the courts has so held with reference to the prohibition embodied in this section.[25]

When Cause Shown under Act within This Prohibition.—In connection with the question as to the right to still remove causes arising under the federal act on the ground of diverse citizenship, it becomes very material to consider when a cause

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23. Same—Construction by reference to debates in congress.—Symonds *v.* St. Louis, etc., R. Co. (Cir. Ct. W. D. Ark. Texarkana Div., Nov. 20, 1911), 192 Fed. 353, 355. See, also, Ulrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y. Feb. 17, 1912), 193 Fed. 768, 769, 770.

24. Construction by reference to its re-enactment into Judicial Code.—Strauser *v.* Chicago, etc., R. Co. (Dist. Ct. D. Neb. Hastings Div., Feb. 12, 1912), 193 Fed. 293, 294.

25. Constitutionality of prohibition against removal.—Kansas City So. R. Co. *v.* Cook (Sup. Ct. Ark., Oct. 23, 1911), 100 Ark. 467, 140 S. W. 579; Symonds *v.* St. Louis, etc., R. Co. (Cir. Ct. W. D. Ark. Texarkana Div., Nov. 20, 1911), 192 Fed. 253, 254.

may be said to arise under the act. For example, in a case which came up in the Federal District Court for the Southern District of New York, upon a motion to remand the cause to the state court, it appeared that the complaint stated a cause of action under, not only the federal act, but also under the New York Labor Law (Consol. Laws N. Y. 1909, c. 31, § 200, et seq.), and lastly under the common law; and upon a contention that the defendant was entitled to remove the causes of action stated under the state statute and the common law, it was held that it was enough to avoid the jurisdiction of the federal court for all purposes that the plaintiff had alleged that he was engaged in interstate commerce, and Judge Hand, in upholding the jurisdiction of the state court as to all three causes of action shown, said:

> "Analogy exists for the interpretation in those cases in which a federal court, having one ground of jurisdiction, can dispose of the whole case, though it involves other matters (Railroad Co. *v.* Mississippi, 102 U. S. 135, 26 L. Ed. 96), as, indeed, in those in which the jurisdiction remains, though the allegations of jurisdiction prove unsupported (City Railway Co. *v.* Citizens' Steel Railroad Co., 166 U. S. 557, 41 L. Ed. 1114, 17 S. Ct. Rep. 653). So here, though the defendant could remove, were it not for the allegations which bring the case within the employer's liability act, I think it could not have been the intention of congress to sever three such knitted causes of action, and bring two into this court, while the other stayed where it was. The 'case' arose, I think, for all purposes under the act."[26]

Where an action was instituted in an Iowa state court by an Iowa administratrix against an Illinois railroad company engaged in interstate commerce for the death of plaintiff's intestate while employed by defendant in such commerce, and the petition failed to allege that decedent left surviving him a widow, child, parent, or next of kin, for whose benefit a right of action survives under the federal act, it was held that the petition did not state a cause of action thereunder, notwithstanding it alleged that, by reason of the facts set forth therein, a cause of action

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26. When cause shown under act within this prohibition—Setting out case under state, common, and federal law.—Ulrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y., Feb. 17, 1912), 193 Fed. 768, 771.

had accrued to the plaintiff against the defendant under and by virtue of that act; and hence the action was held removable for diversity of citizenship.[27]

Fraudulent Allegations Designed to Prevent Removal.—Where the defendant would otherwise be entitled to remove, he may show that the plaintiff has made false and fraudulent allegations of jurisdictional facts with intent to prevent a removal, as that he has made a fraudulent joinder of defendants and fraudulently based his action on the federal act for the purpose of defeating a removal.[28] In such case, however, the petition seeking a removal must not only allege bad faith and fraud, but such facts and circumstances as will be sufficient, if true, to demonstrate that the plaintiff is making a fraudulent attempt to impose upon the court and deprive the petitioner of his right of removal; and this, notwithstanding the rule that where a petition for removal contains sufficient facts to require a removal, the state court cannot pass upon or decide the issues of fact so raised.[29] Allegations in a petition for removal, in an action against a foreign railroad company and a domestic corporation whose road it had leased, denying that plaintiff was engaged in interstate commerce at the time of his injury, and alleging that he had made a fraudulent joinder of defendants and had fraudulently based his action upon the federal act for the purpose of preventing a removal to the federal courts, are not sufficient to justify a removal where it appears from a perusal of the pleadings and the admissions of record not inconsistent therewith that plaintiff was in its employ as a locomotive engineer, that he had been operating the engine, defects in which caused the injury sued for, over a portion of the leased road used as a part of the petitioner's trunk line and on to a point in another state and engaged in moving interstate freight trains, that the engine having been taken to the shops for repairs was at the time of the in-

27. **Same—Failure to allege beneficiaries named by statute.**—Thomas *v.* Chicago, etc., R. Co. (Dist. Ct. N. D. Iowa, Cedar Rapids Div., Feb. 17, 1913), 202 Fed. 766.

28. **Fraudulent allegations designed to prevent removal.**—Lloyd *v.* North Carolina R. Co. (N. C.), 78 S. E. 489.

29. **Same—Allegation and proof of facts.**—Lloyd *v.* North Carolina R. Co. (N. C.), 78 S. E. 489.

jury on a side track connecting with the main line of the leased road ready for a trial trip to another point in the same state, and that plaintiff was inspecting and oiling it for the purpose of taking such trip and with a view of further service for the petitioner.[30]

4. Venue.—Section 6 of the Act of April 22, 1908, as amended April 5, 1910, provides: "Under this act an action may be brought in a circuit court (now district court) of the United States, in the district of the residence of the defendant or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." As to cases arising under the act and involving questions of venue previous to this amendment, see below.[31]

Waiver of Objections.—Where, in an action in a federal court by an employee against a railroad company for a personal injury, the petition does not expressly declare upon the federal act, but the court submits the case to the jury upon the theory that it is based on that statute, the failure of the defendant at any time to raise the objection that it is not suable under such statute in that district is a waiver of such objection.[32]

5. Party Plaintiff.—See ante, "To Whom Given," III, H, 1, b.

6. Declaration or Complaint.—Unnecessary to Plead Statutes.—A right of action for wrongful death being unknown to the common law, it is essential that it be based upon some ap-

30. **Same—Same.**—Lloyd *v.* North Carolina R. Co. (N. Car.), 78 S. E. 489.

31. **Venue previous to amendment of April 5, 1910.**—Smith *v.* Detroit, etc., R. Co. (C. Ct. N. D. Ohio, W. D., Dec. 9, 1909), 175 Fed. 506; Clark *v.* Southern Pac. Co. (Ct. C. W. D. Tex., El Paso Div., Dec. 20, 1909), 175 Fed. 122; Whittaker *v.* Illinois, etc., R. Co. (C. Ct. E. D. La., Jan. 24, 1910), 176 Fed. 130.

Venue of suit by foreign personal representative.—As to the venue of a suit brought by a foreign personal representative under the Act of June 11, 1906, and the right of such representative to sue, see ante, "To Whom Given," III, H, 1, b.

32. **Waiver of objection to venue.**—Erie R. Co. *v.* Kennedy (Cir. Ct. App. 6th Cir., Nov. 7, 1911), 191 Fed. 332.

plicable statute.[33] But under the doctrines relating to the judicial notice of statutes, it is not necessary to plead the federal statute in order to rely thereon in an action in a state court, since it is not a foreign law as to the state courts. It is sufficient to set out a statement of facts bringing the case within the terms of the statute.[34] The case is different from taking a constitutional point in a state court for writ of error to the Federal Supreme Court.[35] Neither is it necessary to plead the statute in the federal courts or refer thereto in the declaration in order to confer jurisdiction. If the facts are sufficient to sustain an action under the statute, appropriate allegations thereof are all that is necessary, since it is the duty of the courts, state and federal, to take notice of and enforce the laws of the United States, and they are presumed to be cognizant thereof without pleading, and to know that this particular act had the effect of superseding all state laws with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment.[36]

The proper procedure, as heretofore stated, is to plead the

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33. Declaration or complaint—Necessity for basing statutory action upon applicable statute.—Michigan, etc., R. Co. *v.* Vreeland, 227 U. S. 59, 67, 57 L. Ed. 192, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Seale, U. S. Adv. S., 57 L. Ed. 651, 652, — S. Ct. —.

34. Same—Unnecessary to specifically plead or refer to statute in state courts.—St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark., Feb. 27, 1911), 135 S. W. 874; Bradbury *v.* Chicago, etc., R. Co. (Iowa), 128 N. W. 1; Southern R. Co. *v.* Ansley, 8 Ga. App. 1086; Kansas City So. R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579, 580.

35. Same.—Ulrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y.), 193 Fed. 768, 771.

36. Same—In federal courts.—Missouri, etc., R. Co. *v.* Wulf, — U. S. —, — L. Ed. —, 33 S. Ct. 135; Ulrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y., Feb. 17, 1912), 193 Fed. 768, 771; Cound *v.* Atchison, etc., R. Co. (C. C. & W. D. Tex.), 173 Fed. 527, 532; Whittaker *v.* Illinois, etc., R. Co. (C. Ct. E. D. La.), 176 Fed. 130; Smith *v.* Detroit, etc., R. Co. (C. Ct. N. D. Ohio), 175 Fed. 506; Clark *v.* Southern Pac. R. Co. (C. C.), 175 Fed. 122; Erie R. Co. *v.* Kennedy (C. C. A.), 191 Fed. 332; St. Louis, etc., R. Co. *v.* Hesterly, 135 S. W. 874; Kansas City Co. R. Co. *v.* Cook (Sup. Ct. Ark., Oct. 23, 1911), 100 Ark. 467, 140 S. W. 579, 580.

facts,[37] setting them out, if need be, in separate counts, where the local practice permits.[38] If, however, the plaintiff does undertake to plead the statute, state or federal, an erroneous reference to the one in a cause of action which, if sustained at all, must legally rest upon the other, will not invalidate the pleading, but such erroneous plea or reference to the statute may be stricken out as surplusage, and then if there is enough left to state a cause of action under the applicable law the case may proceed to judgment accordingly; or the plaintiff may amend so as to bring himself within the applicable statute subject to the rules applicable to the introduction of new causes of action by amendment.[39] Of course, in order to have the benefit of the federal statute in either the state or federal courts, or to recover under either the state or federal law, it is necessary that the declaration or complaint should allege facts sufficient to show a case under the one law or the other.[40] An alleged right, under the federal statute, not specially set up in the state court and there passed upon, cannot be considered by the Federal Supreme Court on writ of error to a state court.[41]

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37. Plaintiff should plead the facts.—Erie R. Co. *v.* Kennedy (C. C. A.), 191 Fed. 332. See, also, ante, "Exclusive or Controlling Operation of Federal Act—Superseding State Law," III, G, 2.

38. Setting out facts in separate counts.—Thomas *v.* Chicago, etc., R. Co. (Dist. Ct. N. D. Iowa), 202 Fed. 766.

39. Effect of erroneous plea or reference to statute.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 57, 57 L. Ed. —, 33 S. Ct. 135, 137. See, also, Erie R. Co. *v.* Kennedy (C. C. A.), 191 Fed. 332. And see ante, "Exclusive or Controlling Operation of Federal Act—Superseding State Law," III, G, 2; "To Whom Given," III, H, 1, b.

40. Declaration must allege facts showing a case under statute. —Bradbury *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 128 N. W. 1; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086; Watson *v* Southern R. Co. (C. C. N. Dist. Ga.), 179 Fed. 175, 176; St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark.), 135 S. W. 874; Tsmura *v.* Great Northern R. Co. (S. Ct. Wash.), 108 Pac. 74; Whittaker *v.* Illinois, etc., R. Co. (C. C. E. D. La.), 176 Fed. 130; Missouri, etc., R. Co. *v.* Neaves (Tex. Civ. App.), 127 S. W. 1090, 1091, affirmed, no op.; Missouri, etc., R. Co. *v.* Hawley (Tex. Civ. App.), 123 S. W. 726; Thomas *v.* Chicago, etc., R. Co. (D. C. N. D. Iowa), 202 Fed. 766.

41. Rights not set up in state court not available upon writ of error.—Chicago, etc., R. Co. *v.* Hackett, 228 U. S. —, Adv. S., 57 L. Ed. 581, 33 S. Ct. —.

The plaintiff who desires to avail himself of the federal act has the burden of alleging and proving a case within the statute.[42] If, however, the declaration or complaint does show a state of facts sufficient to bring the case within the statute, it will be presumed that the case is brought under the statute and the declaration or complaint will be so construed and the action will be governed by the act, whether the same be specifically declared on or not.[43] On the other hand, where the declaration or complaint fails to allege facts showing a case within the statute, it will be presumed and held that the plaintiff is not seeking a recovery under the federal act, but under the state law, and the sufficiency of the declaration or complaint will be tested by the state law,[44] and where, under the rules of pleading in vogue in the state, the plaintiff is not required to make specific allegations as to the character of the commerce in which he and the defendant were engaging at the time of the injury the declaration or complaint will not be subject to demurrer as failing to show whether the plaintiff is proceeding under the federal act or under the state law.[45]

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42. Burden upon plaintiff to show a case under the statute, if he desire to proceed under same.—Tsmura *v.* Great Northern R. Co. (S. Ct. Wash.), 108 Pac. 774; St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark.), 135 S. W. 874; Bradbury *v.* Chicago, etc., R. Co. (Iowa), 128 N. W. 1.

43. Action presumed brought under statute where declaration sufficient.—Whittaker *v.* Illinois, etc., R. Co. (C. Ct. E. D. La., Jan. 24, 1910), 176 Fed. 130; Cound *v.* Atchison, etc., R. Co. (C. Ct. W. D. Texas, El Paso Div., Nov. 6, 1909), 173 Fed. 527, 532; Smith *v.* Detroit, etc., R. Co. (C. Ct. N. D. Ohio, W. D., Dec. 9, 1909), 175 Fed. 506.

44. Otherwise where declaration fails to allege case under statute.—St. Louis, etc., R. Co. *v.* Seale (Tex. Civ. App., June 15, 1912, on rehearing, June 22, 1912), 148 S. W. 1099, affirmed, no op.; Missouri, etc., Ry. Co. *v.* Neaves (Ct. of Civ. App. of Tex. April 9, 1910, rehearing denied April 30, 1910), 127 S. W. 1090, 1091, affirmed no op.; Missouri, etc., R. Co. *v.* Hawley, 123 S. W. 726; Bradbury *v.* Chicago, etc., R. Co. (Iowa), 128 N. W. 1; Thomas *v.* Chicago, etc., R. Co. (D. C. N. D. Iowa), 202 Fed. 766.

45. Same—Want of specific allegations as to character of commerce—Demurrer.—St. Louis, etc., R. Co. *v.* Seale (Tex. Civ. App. on rehearing), 148 S. W. 1099, affirmed, no op.; Missouri, etc., Ry.

Thus, in one of the cases cited, it was held that where, in an action for injuries to a brakeman by an alleged defect in a freight car, there was no evidence that the train or any car in it, or any item of freight contained in any car forming a part of the train, was destined or carried to a point outside the state, but it appeared that defendant's road was wholly within the state, and that it operated no trains outside of it, defendant was not prejudiced by the overruling of a special demurrer to the petition for its failure to allege whether, when plaintiff was injured, defendant was engaged in interstate or intrastate commerce.[46]

What is here said as to demurrer applies, of course, to actions brought in the state courts, for if the action is brought in the federal courts, and the jurisdiction is dependent upon showing a case under the federal act, it is necessary to show specifically the character of the commerce in which the defendant and the injured employee were engaged at the time of the accident in order to show a case within the jurisdiction of the court.[47]

Allegations Necessary to Show Cause of Action under Federal Act—That Plaintiff and Defendant Were Engaged in Interstate Commerce.—In order to state a cause of action under the federal act, it is essential that the plaintiff's pleading should allege that the defendant, at the time of the injury, was a common carrier engaged in interstate commerce by railroad,[48] and it should further allege the facts showing that plaintiff, or the deceased, was injured while employed by the de-

Co. *v.* Neaves (Ct. of Civ. App. of Tex., Apr. 9, 1910, rehearing denied Apr. 30, 1910), 127 S. W. 1090, affirmed no op.; Missouri, etc., R. Co. *v.* Hawley (Tex. Civ. App.), 123 S. W. 726.

46. Same.—Missouri, K. & T. Ry. Co. of Tex. *v.* Hawley (Ct. Civ. App. of Tex., Dec. 4, 1909), 123 S. W. 726.

47. Same—Where action in federal court and jurisdiction dependent upon federal act.—Walton *v.* Southern R. Co. (C. Ct. N. D. Ga.), 179 Fed. 175.

48. Allegations necessary to show case under federal act—Character of commerce.—Walton *v.* Southern Ry. Co. (Cir. Ct. N. D. Ga., Apr. 30, 1910), 179 Fed. 175, 176; St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark.), 135 S. W. 874; Tsmura *v.* Great Northern R. Co. (S. Ct. Wash.), 108 Pac. 774.

fendant in connection with such commerce.[49] Thus a complaint which alleged that defendant "was a railroad corporation operating a line of railroad in the State of Oklahoma, and was * * * a common carrier of freight and passengers for hire" in that state, but which did not allege that it was engaging in interstate commerce, or that decedent was injured while employed by it in connection with such commerce, was insufficient to show a cause of action under the federal act.[50] And an allegation in the declaration that "at the time of the injuries hereinafter complained of your petitioner was engaged in the transportation of interstate commerce" is insufficient to state a cause of action under the federal act in the absence of any allegation that defendant was a common carrier engaged in interstate commerce by railroad.[51] So an employee of a railroad engaging in interstate commerce, who showed that he was injured while loading rails on a flat car in consequence of the negligence of fellow servants, but who did not show whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded, was held not to be entitled to the benefits of the act.[52]

On the other hand, allegations that the defendant railway company, a Missouri corporation, was engaged as a common carrier of commerce between the states of Missouri, Kansas, Arkansas and Texas, and that plaintiff was employed at the time of his injury as a swing brakeman on a local freight train running from Texas into Arkansas, were sufficient to show that plaintiff's injury occurred while he and the defendant were engaged in interstate commerce, so as to bring the case within the Act of April

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49. Same—That plaintiff or deceased was engaged therein.—St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark.), 135 S. W. 874; Tsmura *v.* Great Northern R. Co. (S. Ct. Wash.), 108 Pac. 774.

50. Same.—St. Louis, etc., R. Co. *v.* Hesterly (S. Ct. Ark., Feb. 27, 1911), 135 S. W. 874.

51. Same—That defendant was a common carrier by rail; engaging in interstate commerce.—Walton *v.* Southern Ry. Co. (Cir. Ct. N. D. Ga., Apr. 30, 1910), 179 Fed. 175.

52. Necessary allegations where employee injured while loading or unloading cars.—Tsmura *v.* Great Northern R. Co. (S. Ct. Wash., May 11, 1910), 108 Pac. 774.

22, 1908, as amended by the Act of April 5, 1910. The allegation being plainly to the effect that the train was running from the State of Texas into the State of Arkansas, it was immaterial that it was described as a local freight train, and without specific allegation that it was then carrying consignments across the state line. The mere operation of the train across the state line for the purpose of carrying such interstate shipments as might be offered was of itself interstate commerce without regard to whether it actually carried any shipments of that character upon that particular trip or not.[53] Nor was it necessary for the complaint to contain a statement that the particular defective car which caused the injury was one used in interstate traffic. If it constituted a part of the train at the time plaintiff was injured, and he was then engaged in discharging his duties in operating a train engaged in interstate commerce, it is sufficient.[54]

Where the complaint alleges, not only those facts upon which depends the "right" created by the federal act, but also those upon which depend another "right," created by the state law, and, moreover, those upon which the common law "right" depends, it is sufficient. The "case," for all purposes, arises under the Federal Employers' Liability Act, when the plaintiff alleges that he was himself engaged in interstate commerce and is injured by an interstate railroad.[55]

And where the injury occurred in one of the territories, a petition which alleged injury to plaintiff by the negligence of a carrier while plaintiff was in the performance of his duty, sufficiently showed that the action was based on the federal act, though it did not so allege in terms.[56]

Same—Existence of Beneficiaries.—The complaint in an

53. Allegations where brakeman injured on train carrying both kinds of commerce.—Kansas City So. R. Co. *v.* Cook (Sup. Ct. Ark., Oct. 23, 1911), 100 Ark. 467, 140 S. W. 579, 580.

54. Same—Allegations as to particular defective car.—Kansas, etc., R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579, 580.

55. Complaint setting out cause under state, federal, and common law.—Ulrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y., Feb. 17, 1912), 193 Fed. 768, 771.

56. Where injury occurs in territory.—Clark *v.* Southern Pac. Co. (C. Ct. W. D. Tex., El Paso Div., Dec. 20, 1909), 175 Fed. 122.

action under the statute for the death of a railroad employee must allege the existence of persons answering the description of the beneficiaries named in the statute; because the action is statutory, and without the statute, the right to bring it would not exist. The representative is vested with the right to bring it, but only for the benefit of those who are named in the statute. He is thereby made a statutory trustee for them, not for the benefit of the decedent's estate. The fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore, if there is no beneficiary within the description of the statute, there is no right of action; for the liability of the defendant is made contingent upon the existence of one or more beneficiaries. If there are none, there is no liability. The existence of one or more beneficiaries answering the description of those named in the statute is, therefore, a jurisdictional averment.[57]

Certainty of Allegations.—Whether the defendant was engaged in intrastate or interstate commerce at the time being a matter peculiarly within defendant's knowledge, the plaintiff is not required to allege such fact with the certainty required as to facts within his own knowledge.[58]

Amendment of Declaration or Complaint.—As to amending the declaration or complaint so as to change the capacity in which the plaintiff sues, see ante, "To Whom Given," III, H, 1, b.

7. Plea or Answer.—It has been held that where, in an action in a state court, the plaintiff sets forth a state of facts showing that he is entitled to recover under the state law, the defendant seeking to invoke the federal statute to defeat the plaintiff's right to recover in accordance with the state law, must plead the same;[59] otherwise, the fact that plaintiff, when he received the

57. **Complaint must allege existence of beneficiaries.**—Melzner *v.* Northern Pac. R. Co. (Sup. Ct. Mont., Oct. 26, 1912), 127 Pac. 1002; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

58. **Certainty of allegations.**—Missouri, K. & T. Ry. Co. *v.* Hawley (Ct. Civ. App. of Tex., Dec. 4, 1909), 123 S. W. 726.

59. **Necessity for defendant's pleading federal act.**—St. Louis, etc., R. Co. *v.* Seale (Tex. Civ. App., June 15, 1912, on rehearing, June 22, 1912), 148 S. W. 1099, reversed on the facts and on the issue as to whether or not the defendant's objection that the action was

injury sued for, was engaged in interstate commerce, not having been pleaded, and so not being in issue, will not be admissible in evidence, or, if admitted, is subject to be stricken out.[60]

There is nothing unreasonable in the requirement that a defendant proposing to defend upon the ground that the action is controlled by the federal act shall either plead the same or interpose it by proper objections. The important question is as to the time in which such plea must be tendered or objection raised. In the Bradbury Case, cited in the notes, it was held not to be an abuse of discretion to sustain a motion to strike an amendment to the answer, filed after all the evidence was adduced, raising the issue that plaintiff's injury was received while employed on a train engaged in interstate commerce.[61] And in a Georgia Case heretofore cited, in which the plaintiff specifically based his action upon the Alabama statute, it otherwise appearing from the petition, and afterwards from the evidence, that the case arose in interstate commerce and was controlled by the federal act, it was held that an amendment to the answer setting up that fact was in the nature of a plea in abatement and came too late because not filed at the appearance term.[62] The error, if any, in the ruling in that case was harmless, however, since it further appears that the court discarded all references in the petition to the Alabama statute and tried the case under, and gave judgment in accordance with, the federal act.[63]

In the Seale Case, it was held by the Federal Supreme Court, reversing the Texas court, that an objection by an interstate railway carrier sued for the death of an employee that, if liable at all, it was under the Federal Act of April 22, 1908, and, by the

controlled by the federal act was offered in time, in St. Louis, etc., R. Co. *v.* Seale, 228 U. S. —, Adv. S., 57 L. Ed. 651, — S. Ct. —; Bradbury *v.* Chicago, etc., R. Co. (Iowa), 128 N. W. 1.

60. Same—Admissibility of evidence—Variance.—Bradbury *v.* Chicago, etc., R. Co. (Iowa), 128 N. W. 1.

61. Time of interposing plea or objection that case is controlled by federal act.—Bradbury *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 128 N. W. 1.

62. Same.—Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086, 1089.

63. Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086.

terms of that act, liable only to the personal representatives of the deceased, and not to the plaintiffs, who were his widow and parents, was interposed in time, so that the state court erred in overruling it, where the petition stated a case under the state statute, and the carrier, having called attention to the federal statute by special exceptions, and having suggested that the state statute might not be the applicable one, again made the specific objection, grounded on the federal statute, after the evidence disclosed that the real case was controlled by such statute.[64] Upon familiar principles, the decision of the Supreme Court in the Seale Case is not only clearly right, but, in the opinion of the writer, the court might very properly have gone further and held that such objection may be raised for the first time at any stage of the proceedings, and that the Georgia decision and other cases holding such objection to be in the nature of a dilatory plea, which must be plead in order, are erroneous, for the simple reason that the controlling effect of the federal act, operating, when it applies at all, to supersede the state law, as regards that case, as effectively as though the latter had never been enacted, renders the question jurisdictional, with the consequent right to the defendant to raise it at any stage of the proceeding. And such, in effect, has been the ruling of one of the Texas courts of civil appeal in a case wherein it was held that the right of action for the death of an employee of a railroad, engaged in interstate commerce, killed while in such employment, being wholly dependent on the Act of April 22, 1908, declaring the railroad liable to deceased's personal representative for the benefit of certain persons, the right to insist on the defense that the action cannot be maintained by the beneficiaries was not waived by first answering to the merits in an action brought by them.[65]

The objection that a carrier sued for the death of an employee is estopped to rely upon the Act of April 22, 1908, by having pleaded contributory negligence, and thus having relied upon the

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64. Same—Rule in Seale Case.—St. Louis, etc., R. Co. *v.* Seale, 228 U. S. —, Adv. S., 57 L. Ed. 651, 33 S. Ct. —, reversing 148 S. W. 1099.

65. Same—Plea of statute held not waived by first answering to merits.—Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App., June 29, 1912), 149 S. W. 841.

state law, is not available to defeat a writ of error from the Federal Supreme Court to a state court, where the latter court held that the federal question was sufficiently raised and decided it.[66] Moreover, as pointed out by the court, since the plaintiff, and not the defendant, had the election as to how the suit should be brought, and elected to bring it under the state law, the defendant had no choice if it was to defend upon the facts.[67]

Plea to Venue, Where Action Brought in Federal Court.—Where the complaint in an action brought in a federal court does not specifically base the action upon either the State or federal statute, an objection that the action is brought in the wrong venue is waived if not urged at the proper time.[68]

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(TO BE CONTINUED.)

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66. Estoppel to rely upon federal act by reason of plea of contributory negligence.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. —, Adv. S., 57 L. Ed. 703, 33 S. Ct. —.

67. Same.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. —, Adv. S., 57 L. Ed. 703, 33 S. Ct. —.

68. Plea to venue, where action brought in federal court.—Erie R. Co. *v.* Kennedy (C. C. A.), 191 Fed. 332.